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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

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**No. [redacted] 192**

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HI HAT ELKHORN COAL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

TED NEWMAN,
*Respondent.*

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## REPLY BRIEF FOR PETITIONER

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

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**No. 1052**

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HI HAT ELKHORN COAL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

TED NEWMAN,
*Respondent.*

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## REPLY BRIEF FOR PETITIONER

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

1. In brief for Respondent it is asserted that the Court of Appeals of Kentucky in the case of *Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S.W. (Ky) 2d 71, decided that the Petitioner did not have the right to wash and otherwise process coal mined from lands other than the Newman mineral boundary. This position is based upon the following language in that opinion:

> "Appellant's principal contention is that under a standard mineral deed it could legally process coal and dump refuse on appellee's land regardless of the source of the coal. The right to do so, if it exists, arises from a provision of the mineral deed which permits appellant to use the surface of appellee's land

'for the removal over and through said land, (of) the products taken out of any other land owned or hereafter acquired' by appellant. That such a provision does not give the right contended for was decided in Pike-Floyd Coal Co. v. Nunnery, 232 Ky. 805, 24 S. W. 2d 614." 352 S. W. 2d at 72.

In making this assertion, counsel has fallen into the same error as committed by the Circuit Court of Appeals for the Sixth Circuit, for both counsel and the lower court assumed that the question of processing coal was decided by the Court of Appeals of Kentucky in the Newman case, when, in fact, no such question was before that court. As pointed out in the petition for writ of certiorari, the only right contended for by petitioner on its appeal to the Court of Appeals of Kentucky in the case of *Hi Hat Elkhorn Mining Company* v. *Newman, supra*, related to the right of the coal company to dump gob from its tipple which had been mined from other tracts of land. In fact, as has been pointed out, the Circuit Judge, in that case, instructed the jury that the coal company had the right to construct and operate the tipple and washer plant and plaintiff could not recover damages to his land by reason of such operation (10a). The only question submitted to the jury was the damages to Newman's land caused by the dumping of refuse which had been taken from other lands (10a). *Hi Hat Elkhorn Mining Company* contended it had such right. The Court of Appeals of Kentucky held that it could not dump any refuse which had been mined from other land and this was the only question determined by the Court of Appeals of Kentucky in the case so strongly relied upon by Respondent.

A careful reading of that opinion will show that the court emphatically stated that "the cause of the complaint was the dumping of refuse on the surface incident to the

washing and otherwise processing of coal mined on both appellee's property and other tracts" and that "while dumping refuse may be an integral part of the mining operations on a particular tract, it is not an authorized incident of removing coal from other tracts" (352 S. W. 2d 72).

It should also not be overlooked that the Court of Appeals of Kentucky in the Newman case, expressly pointed out that the instructions given to the jury presented the only issue in the case and the correct measure of damages. These instructions authorized Newman to recover only for the dumping of mine refuse on his property, which had been taken from other lands. This was the issue which the Court of Appeals of Kentucky declared was the only issue in the case. It should also be kept in mind that in the Newman case the judgment was reversed because of excessive damages and with directions to grant a new trial on the sole issue of damages caused the Respondent by the dumping of refuse from coal mined from other lands.

*Hi Hat Elkhorn Mining Company v. Newman*, 352 S. W. (Ky) 2d 72.

It is true that in the case of *Hi Hat Elkhorn Mining Company* v. *Newman*, *supra*, the dumping of refuse on the surface was incident to the washing and otherwise processing of coal mined on both appellee's property and other tracts.

*Hi Hat Elkhorn Mining Company* v. *Newman*, 352 S. W. (Ky) 2d 72.

It is also clear that the appellant in that case took the position that the dumping of refuse on the surface was incident to such washing and processing of coal. The right to process and wash the coal was not involved or

decided because the Circuit Judge had instructed the jury that the coal company had such right and Newman did not appeal from such instruction.

In fact, the Court of Appeals of Kentucky, in the case of *Tolliver* v. *Pittsburgh Consolidated Coal Company*, 290 (Ky) S. W. 2d 471, squarely held that under a mineral conveyance identical with the one involved in the case at bar, that the coal company had the right to operate its tipple and washer plant not only for coal in the tract where the tipple was built, but also for coal produced from other lands.

We again call to the attention of the court the case of *Trivette* v. *Consolidation Coal Company*, 296 Ky. 529, 177 S. W. 2d 868. In that case the coal company constructed an electric transmission line in connection with coal mined from tracts other than the Trivette tract. In this case, the grantor to the mineral deed excepted all timber exceeding fourteen (14) inches in diameter, together with the right to cut and remove such timber. It was contended in that case that this exception nullified the right of the coal company to construct the transmission line, since the evidence showed that a transmission line could not be constructed without removing timber exceeding fourteen (14) inches in diameter. In rejecting this contention, the Court of Appeals of Kentucky said:

> "• • • To this contention, which constitutes the major attack upon the correctness of the judgment appealed from, appellee responds, *and we think justly, that under the principles enunciated in Case v. Elk Horn Coal Corporation, supra; Wells v. North East Coal Co., 255 Ky. 63, 72 S. W. 2d 745; and Himler Coal Co. v. Kirk, 205 Ky. 666, 266 S.W. 355, the right to construct a transmission line necessary or convenient in the prosecution of its mining operations, was absolute, though*

*not literally expressed; and that the sole intent of the inserted provision was to limit the size of the timber which might be used for mining purposes.* Otherwise, all uses of the surface, no matter how essential to the operation of the mines and the removal of the minerals might be prohibited since it might be impossible to clear any requisite surface space without removing timber over 14" in diameter. Surely, it is duty of the court to adopt a construction of the deed which will not defeat the obvious purpose for which it was executed." (177 S. W. 2d 870) (Our Emphasis)

There is no difference, we submit, in principle between the Trivette case and the case at bar. It is no less the duty of this Court in the case at bar to adopt the construction of this deed, which will not defeat the obvious purpose for which it was executed. That purpose, of course, was so that the coal could be mined, not only from the Newman mineral boundary, exceeding 400 acres, but also from other tracts as well. It is ridiculous, we submit, to contend that the coal company has the right to transport coal over this tract of land which it had mined from other tracts, but does not have the right to put in such condition that it can be sold on the coal market. The construction placed on the mineral deed in this case by the Circuit Court of Appeals for the Sixth Circuit construes this conveyance in such a way as to defeat the very purpose for which it was executed.

Paraphrasing the language used in the case of *Trivette* v. *Consolidation Coal Company*, 296 Ky. 529, 177 S. W. 2d 868, *the right to wash and process coal, mined from other lands, which was necessary or convenient in the prosecution of petitioner's mining operations, was absolute, though not literally expressed.* (Our Emphasis)

2. It is contended in brief for respondent that Newman's

failure of proof of damages for processing outside coal to August 1, 1959, did not prevent a recovery of subsequent damages. The trouble with this assertion is that the respondent did not prove any damages to his land (See opinion of District Judge, pp. 23-28).

However, there is more involved in this case than the mere failure of proof. In the Kentucky action, Newman sued *Hi Hat Elkhorn Mining Company* for $50,000 because of his claim that his land had been damaged due to the processing of coal from other lands (See Exhibit No. 3, Petitioner, Pages 1-3). The trial judge expressly held that it was not liable to Newman for such processing of coal and limited his recover to damages caused his land by the dumping of mine refuse on the land which had been mined from other tracts. The ruling was upheld by the Court of Appeals of Kentucky. The court should note that when the case was reversed, it was remanded to the court below with directions to determine the damages caused to Newman's land because of the dumping of mine refuse which had been mined from other tracts. This was exactly the same ruling which the Circuit Court made and this is the only question decided by the Court of Appeals of Kentucky in the case of *Hi Hat Elkhorn Mining Company v. Newman, supra.*

The case of *City of Covington* v. *First National Bank of Covington*, 198 U. S. 100, 49 L. E. 963, 25 Sup. Ct. 562, does not in the slightest degree, sustain the contention of the plaintiff. In that case, this Court held that an adjudication of the State Court that a bank has a contract exemption from taxation on its capital stock is not res adjudicata in the Federal Court as to taxes for years other than the one directly involved in the judgment.

However, in the case at bar, Newman has a much weaker position because as has been heretofore pointed out, he sued for $50,000.00 for damages claimed to have been

caused his land by reason of processing of coal from other lands. When all the evidence was in the Circuit Judge instructed the jury that the coal company had the right to process such coal and that Newman could not recover any damages because of such processing of coal. He did not choose to appeal his case to the Court of Appeals of Kentucky, but elected to try the case on the record that the coal company had the unquestionable right to process coal mined from other tracts and the Court of Appeals of Kentucky sustained the Circuit Judge in his ruling that the coal company did have the right which Newman now contends does not exist.

Newman, we submit, cannot relitigate the same question which had been determined against his contention in the case of *Hi Hat Elkhorn Mining Company* v. *Newman, supra.* If there ever was a case where the doctrine of estoppel should apply, it is, we submit, the case at bar.

3. In brief for Respondent it is maintained that the petitioner did not establish title by adverse posession because of the insistence that prior to 1956, *Hi Hat Elkhorn Mining Company* was engaged solely in transporting outside coal. This position cannot be sustained because it ignores all the evidence on this question.

The undisputed evidence shows the following facts:

(1) A tipple was constructed in 1936 by the predecessor in title of *Hi Hat Elkhorn Mining Company.* This tipple was used continuously for the processing of coal from other lands until 1943, when it was destroyed by fire (39b-40b).

(2) A new tipple was constructed by *Hi Hat Elkhorn Mining Company* two months later, was put in operation in 1943 and was used for such processing of coal for more than fifteen years prior to the institution of this action by respondent (39b-40b).

(3) The washer plant was completed in 1957 and was first used in that year. This washer was merely an addition to the tipple, but an integral part of such structure (39b-40b).

The only difference in the operation of the tipple and the operation of the tipple and washer is that the washing of the coal is more automatic. In other words, the petitioner's predecessor in title did everything from 1943 to 1957, for a period of sixteen years, that the petitioner is doing now except that the coal is now washed automatically when the coal was, prior to 1957, washed by hand.

These undisputed facts clearly establish by adverse possession the right of the petitioner to process coal from other lands, especially in view of the evidence of Respondent that coal, mined from other lands, had been processed over this tipple for more than twenty years (17a).

We respectfully request that the judgment of the Court of Appeals be reversed insofar as it holds that the petitioner may not use its tipple and washer plant in connection with coal mined from other tracts of land.

Respectfully submitted,

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